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No. 89-1190

# In the Supreme Court of the United States

October Term, 1989

AMAZING STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondents.

## REPLY BRIEF OF PETITIONER

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## ARGUMENT

In its petition, Amazing Stores argued that respondent NLRB had disregarded the rights of petitioner's present employees under § 7 of the NLRA by compelling *Gissel* bargaining without hearing evidence concerning the effect of the 95% turnover in employment in the bargaining unit since the unfair labor practices. In addition, petitioner pointed out that the decision of the District of Columbia Circuit was in direct conflict with decisions of other circuits, particularly the Second Circuit.

In his brief in opposition, the acting Solicitor General sought to describe the NLRB's decision that turnover had not dissipated the effect of the unfair labor practices as a reasonable resolution of the factual question of the effect of turnover, even though the administrative law judge had never taken testimony concerning the effect of turnover or made findings on that issue. In addition, by treating the issue as one of sufficiency of the evidence to support the NLRB's findings, the acting Solicitor General sought to explain away the conflict among the circuits.

### I. THERE WAS NO FACTUAL BASIS UNDERLYING THE BOARD'S CONCLUSION THAT TURNOVER DID NOT DISSIPATE THE EFFECT OF THE UNFAIR LABOR PRACTICES.

Respondent points to two statements as evidence that the factual question of the effect of 95% turnover in the workforce since the unfair labor practices had been weighed and the issue resolved in favor of a determination that turnover did not eliminate the need for a *Gissel* order.

First, the administrative law judge stated that he had "no doubt" that petitioner's management would "let their employees know that their joint will is unchanged . . ." Op. Cert. at 3, quoting Pet. App. A41. But it is clear that the administrative law judge was not considering the possible effect of turnover when he reached this conclusion. Rather, the ALJ was postulating a workforce which had already been exposed

to unfair labor practices and could be reminded of those practices. When, in the months that the case was pending before the NLRB, the turnover in employees reached 95%, petitioner asked the Board to remand to consider the effect of that turnover, but the Board refused.

The turnover and passage of time is material. A workforce that had been involved in a recent heated organizing campaign and an equally heated opposition to that campaign could be expected to react strongly to the actions of petitioner's managers who had led that opposition. New employees would have no such sensitivity. More to the point, they might either be such stalwart unionists that no actions by petitioner's managers could affect them or such right-to-work enthusiasts that those managers would perceive no need to act. Respondent was simply incorrect in viewing the administrative law judge's statements made in another context as a determination that turnover had not dissipated the effects of the unfair labor practices.

Second, respondent points to the language in footnote 2 of the Board's Opinion, Pet. App. A9-A10 n.2, explaining why the Board had denied petitioner's motion to reopen the record, as evidence of the effect of employee turnover. Because the unfair labor practices were pervasive, directed at virtually every employee, serious and committed by top management, the Board concluded that it was "foreseeable that [petitioner's] record of coercion would become known to new employees and the impact of [its] violations would be likely to persist despite any turnover, thus preventing the holding of a fair election." Op. Cert. at 4. This is simply a prediction that turnover will have no effect without allowing the ALJ to take evidence or make findings on that question.

Nevertheless, in describing the Board's action, respondent argues: "The Board simply disagreed with petitioner's basic claim that employee turnover had eliminated the need for a bargaining order." Op. Cert. at 6. But the Board never made any such finding. Rather, having refused to hear any

evidence on the question, the best it could say was that the impact of earlier violations "would be likely to persist" and thus prevent a fair election. Yet the Court of Appeals affirmed. The denial of the present employees' § 7 rights should not be based on such speculation and prediction.

## II. THERE IS A CLEAR CONFLICT BETWEEN THE DECISION BELOW AND THE NUMEROUS DECISIONS OF THE SECOND CIRCUIT REQUIRING THE NLRB TO BASE THE EVALUATION OF THE EFFECT OF TURNOVER ON FACT RATHER THAN PREDICTION.

Respondent seeks to explain away the conflict in circuits by arguing that the Board "plainly did not fail to analyze the effect of employee turnover," Op. Cert. at 6, and, accordingly, followed the same rule as the Second Circuit which likewise "has consistently required the Board to consider employee turnover before it issues a *Gissel* bargaining order," *id.*

The conflict, however, is plain. In the cases considered by both courts, the Board has refused to reopen the record for evidence of the effect of turnover and has been satisfied on the basis of evidence concerning the seriousness of the violation that turnover has not dissipated the need for a bargaining order. As we noted above, the court below, citing the language of the Board and the ALJ, held that evidence of the seriousness of the violation was sufficient to prove that even 95% turnover did not dissipate the effect of the unfair labor practices. Accordingly, the court below held, the *Gissel* bargaining order could be upheld without reopening the record.

By contrast, the Second Circuit has consistently held that evidence of the seriousness of the unfair labor practices cannot support a conclusion that turnover has not dissipated the effect of those practices. *See, e.g., NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100 (2d Cir. 1985) (not enough that "hallmark violations" were "likely to have a lasting inhibitive effect on a significant portion of the workforce" and "in view of the high-level management source of the threats and the

small size of the workforce, a fair election was 'doubtful, if not impossible.'"); *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 111 (2d Cir. 1984) (not enough that "employer's actions were serious," their impact was "enduring," "the coercive, chilling impact would linger long after the strike participants had either returned to or departed from [Pace's] employ" and "the employer has engaged in 'hallmark' violations such as the discharge of union adherents and the threat of plant closure."); and *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984) (not enough that there was "a pervasive pattern of unfair labor practices," including "'hallmark' violations").

There is a direct conflict of circuits, as even a quick comparison of the language of the Second Circuit with the language relied upon by the court of appeals below makes clear. In the Second Circuit, if the NLRB chooses to answer the question of whether turnover has dissipated the need for a *Gissel* order by looking to the violations which constituted the unfair labor practice rather than to the effects of turnover since the violations, the Court of Appeals will reverse. In the District of Columbia Circuit, similar justification led to an affirmance in this case. There is no better test for a conflict in circuits than that the results will be different depending upon which circuit is involved.

Because petitioner's new employees will be represented by a union they had no part in choosing if the *Gissel* bargaining order is enforced, Section 7 of the NLRA requires a real determination whether the bargaining order is still needed in the face of such turnover.

## CONCLUSION

FOR ALL OF THESE REASONS, in addition to the reasons set forth in the petition for certiorari, petitioner respectfully requests that its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

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